

1 ANDREW P. THOMAS  
2 MARICOPA COUNTY ATTORNEY  
(FIRM STATE BAR No. 0003200)

3 PHILIP J. MACDONNELL  
4 CHIEF DEPUTY  
5 301 WEST JEFFERSON STREET, SUITE 800  
6 PHOENIX, ARIZONA 85003  
7 TELEPHONE: (602) 506-3800  
(STATE BAR NUMBER 003813)

8  
9 IN THE SUPREME COURT OF THE STATE OF ARIZONA

10 IN THE MATTER OF:

11 AMENDMENT OF RULES 4.2, 7.2, 7.4, 27.7,  
12 AND 31.6, RULES OF CRIMINAL  
13 PROCEDURE

ARIZONA SUPREME COURT  
No. R-07-0003

MARICOPA COUNTY ATTORNEY'S  
COMMENTS TO THE PETITION TO  
AMEND RULES 4.2, 7.2, 7.4, 27.7, AND  
31.6, RULES OF CRIMINAL PROCEDURE

14  
15 The Maricopa County Attorney hereby responds to the Petition to Amend Rules 4.2, 7.2,  
16 7.4, 27.7, and 31.6 of the Rules of Criminal Procedure.

17 Respectfully submitted this 14<sup>th</sup> day of June, 2007.

18  
19 ANDREW P. THOMAS  
MARICOPA COUNTY ATTORNEY

20  
21 BY:   
22 PHILIP J. MACDONNELL  
CHIEF DEPUTY



1 that the superior courts enforce Proposition 100. The Courts are now operating under  
2 Administrative Order 2007-30 which mandated new procedures and directives governing the  
3 superior courts. Now the Supreme Court has initiated rule-making to settle on procedures in light of  
4 the experience under the administrative order.

5  
6 **II. Standard of evidence that a defendant is in the United States illegally**

7 In her administrative order the Chief Justice applied the standard of proof evident and  
8 presumption great not only to the offense charged but also to the question of whether an arrestee has  
9 entered or remained illegally in the United States. The Chief Justice reached this conclusion through  
10 an interpretation of the legislative amendment to A.R.S. §13-3961, a conditional enactment that  
11 accompanied Proposition 100, which added paragraph 5 to subsection A:

12 13-3961. Offenses not bailable; purpose; preconviction; exceptions

13  
14 A. A person who is in custody shall not be admitted to bail if the proof is evident or the  
presumption great that the person is guilty of the offense and the offense charged is either:

- 15 1. A capital offense.  
16 2. Sexual assault.  
17 3. Sexual conduct with a minor who is under fifteen years of age.  
18 4. Molestation of a child who is under fifteen years of age.  
19 5. A serious felony offense if the person has entered or remained in the United States  
illegally. For the purposes of this paragraph, "serious felony offense" means any class 1, 2, 3  
or 4 felony or any violation of section 28-1383.

20 The effect of that directive has been as follows in Maricopa County: Approximately 94 % of  
21 those persons held initially by the IA commissioner under a standard of proof evident presumption  
22 great that they committed a class 1-4 felony and to conclude that there was probable cause that they  
23 entered or remained in the United States unlawfully were subsequently considered bondable at the  
24 "Simpson" hearing. *Simpson v. Owens*, 207 Ariz. 261, 85 P.3d 478 (App. 2004). See attached  
25 Exhibit A, Maricopa County Attorney's spreadsheet on Simpson hearings. Thus, the importance of  
26 the standard of proof governing the issue of whether the accused entered or remained unlawfully in  
27 the United States is critical to effectuating the intent of the voters who enacted Proposition 100.  
28

1 Subsection 5 of A.R.S. §13-3961 effectuated the constitutional requirement that the  
2 legislature shall define “serious felony offenses” and added these offenses to the list of nonbailable  
3 offenses if committed by a person who has “entered or remained in the United States illegally.” A  
4 reasonable reading of this enactment would be that the proof evident standard applied to the crime  
5 but not to the illegal status.  
6

7 But it can also be argued under the statute that the proof evident standard extends to the  
8 issue of illegal status. In resolving this ambiguity the courts should effectuate the intent of the  
9 People in enacting the constitutional provision. The plain language of the constitution makes it  
10 clear that the State does not have the higher burden as to the illegal status. In view of that  
11 constitutional purpose, the arguably ambiguous statute should be read consistently with the  
12 constitutional amendment, lest it run afoul of the Arizona Constitution. See *State v. Hansen*, \_\_\_  
13 P.3d \_\_\_, 2007 Westlaw 1575566 (Ariz. 2007)(stating that the Court construes statutes and court  
14 rules to avert needless constitutional tension).  
15

16 But even assuming arguendo, that there is a clear statement of intent by the  
17 Legislature in A.R.S. § 13-3961 for the higher standard to apply to the determination of  
18 illegal presence within the United States, to the extent the statutory language is in conflict  
19 with the Arizona Constitution, the statute must yield, as the Constitution is the supreme law  
20 of the land. *Miller v. Heller*, 68 Ariz. 352, 357, 206 P.2d 569, 572 (Ariz. 1949). The action  
21 of the Legislature in defining “serious felony offense” is entitled to deference, see *State v.*  
22 *Berger*, 212 Ariz. 473, 477, 134 P.3d 378, 382 (Ariz. 2006), but if the Legislature intended  
23 to limit the provisions of the constitution by imposing a higher proof requirement on illegal  
24 status, no such deference is required. *Heller*, supra, 68 Ariz. at 357, 206 P.2d at 572.  
25

26 The proper standard to apply once it has been determined that there is proof evident or  
27 presumption great as to the criminal offense charged the issue of immigration status at this stage of  
28

1 the proceedings should be determined by probable cause that the person is in the United States  
2 illegally. That is the default standard for holding a person in custody under *Riverside v.*  
3 *McLaughlin*, 500 U.S. 44 (1991), and since the voters did not specify another standard, it should be  
4 applied. Probable cause is a sufficient standard for a Grand Jury or a Preliminary Hearing to hold a  
5 person to answer for a capital crime; surely it may be sufficient for ensuring that a suspect will  
6 appear in Court to answer those same charges. In the attached revision to Rule 7.2 new language is  
7 proposed by this Office to implement a probable cause standard for illegal status and a proof  
8 evident standard for the instant offense.  
9

### 10 III. The Hearing Process

11 This Office supports the revisions to Rules 4.2, 7.2 (other than the standard of proof matters  
12 discussed above) and 7.4. These changes should allow the IA commissioners to resolve  
13 nonbailability issues for Prop 100 cases in the same manner that has hitherto applied to other  
14 crimes. Indeed, provisions for holding a person nonbondable are nothing new in Arizona. Prior to  
15 the passage of Proposition 100, Arizona law provided that bail should be denied to individuals  
16 accused of capital crimes and certain sex crimes, and in situations in which the defendant had been  
17 admitted to bail on another felony or is deemed a danger or flight risk. Ariz. Const., Art. II, § 22.  
18 We already have processes in place for dealing with questions of a defendant's nonbondability.  
19 These processes have worked well and should be applied to the new cases added by Proposition  
20 100. There is no reason for a radical departure from current rules and practices just because the  
21 interests of illegal immigrants are now implicated.  
22  
23

24 The process followed in Simpson hearings under the procedures established by the April 3,  
25 2007 administrative order is an experiment that has not worked well. It has proved to be a very  
26 expensive process in the use of scarce judicial, prosecution and defense resources. At times the  
27 court has been overwhelmed with the volume of cases to be held under extremely fast deadlines.  
28

1 Victims' rights are ignored. This Office is preparing a series of Special Actions to file to contest a  
2 series of rulings by commissioners. The actions were delayed because this Office was unable to  
3 obtain court transcripts until very recently. The adoption of Proposition 100, with its provisions for  
4 holding illegal immigrants nonbondable, did not justify this radical new hearing practice.  
5

#### 6 IV. Evidentiary Issues

7 Prior to Proposition 100, a defendant's release conditions following an arrest, and the  
8 question of whether a person was nonbondable under Art. II, § 22 were addressed at the Initial  
9 Appearance, which must be held within 24 hours of the arrest. This process has worked well in the  
10 past and the adoption of Proposition 100 should not change this process.

11 But our experience at the Simpson hearings leads us to raise a series of problems that require  
12 guidance from the Supreme Court to the superior court. The problems concern what evidence is  
13 admissible and reliable at the Initial Appearance and subsequent bail hearings. Prior to Proposition  
14 100, courts have allowed presentation of hearsay evidence through the Form IV. In fact, the court  
15 has memorialized this process in rules and administrative orders. The Form IV is a statement of the  
16 officer, certified as true to the best of his or her knowledge, of the evidence in the case. Of course,  
17 in relying on this Form IV, the courts never required the State to call back the arresting officer to  
18 testify at the Initial Appearance.  
19

20 Most importantly, the Arizona Court of Appeals sanctioned this use of hearsay evidence  
21 when it held that Arizona would follow the "backward-looking model," at bail and preliminary  
22 hearings. Simpson, 207 Ariz. at 275, 85 P.3d at 492. With the backward-looking model, "[t]he  
23 focus of the inquiry...[is on] the factual, as contrasted to the legal, guilt or innocence of the  
24 accused, just as it is when a magistrate is considering whether there is "probable cause" to issue an  
25 arrest warrant.... *Hearsay and other evidence which would be incompetent at trial, as well as*  
26 *illegally obtained evidence, would be admissible at the preliminary examination...."* (Emphasis  
27  
28

1 added); see also Ariz.R.Crim.P. Rule 7.4 (determinations at bail hearings may be based on evidence  
2 not admissible under the Arizona Rules of Evidence); *U.S. v. Abuhamra*, 389 F.3d 309, 321 (noting  
3 that federal statute states explicitly that the Federal Rules of Evidence do not apply at bail hearings).

4 Again, this Form IV evidence has always been acceptable at the Initial Appearance and the  
5 rules and procedures should not be changed simply because that the voters want illegal immigrants  
6 accused of serious crimes held nonbondable. However, after the adoption of Proposition 100, in an  
7 unprecedented move, courts in Maricopa County in Simpson hearings have begun refusing to admit  
8 Form IV evidence and instead demanded that the State produce the arresting officer. This was  
9 never required before, and has led to absurd results. In one instance, the court held that the State  
10 had not “proved” that a defendant was in the country illegally despite the fact that he was  
11 apprehended while in possession of deportation orders.  
12

13 In other instances defendants have admitted to being in the U.S. illegally and the courts have  
14 still found that the State did not prove that they were here illegally. In one case, the defendant made  
15 such an admission and the defendant’s aunt also admitted to an officer that she had paid a smuggler  
16 to smuggle him into the U.S., but amazingly the court still ruled that the State had not proved the  
17 defendant was here illegally. At a minimum, any new rule ought to make clear, either in the rule  
18 itself or in the comments section, that Form IV evidence is to be admitted at the Initial Appearance  
19 and any follow-up hearings that are held on release conditions. *See* 23 Corpus Juris Secundum  
20 Criminal Law § 1117 (the right to confront witnesses has been held inapplicable to various stages,  
21 such as investigation, preliminary hearings generally, and bail hearings.) This evidence has always  
22 been deemed sufficient for bond determination for other defendants. It should also be sufficient for  
23 determining bond for illegal immigrants. See copy of draft Rule 7.2(b) attached which adds  
24 suggested language to make this important point clear.  
25  
26

27 In addition, the comments section should make it clear that the court should generally find  
28

1 that an admission to being in the United States illegally is sufficient to find that the person is in the  
2 United States illegally for the purposes of Proposition 100. This is in keeping with existing case  
3 law that at a bail hearing, *corpus* is not an issue. See Simpson, 207 Ariz. at 275 (“a hearing  
4 regarding whether the proof is evident or presumption great that the accused committed one of the  
5 crimes enumerated in A.R.S. § 13-3961(A) is inherently similar to a preliminary hearing.”); *State v.*  
6 *Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3<sup>rd</sup> 323 (Ariz. App. 2000)(holding that rule of  
7 *corpus delicti* did not apply at preliminary hearing). Unfortunately, this comment is necessary—in  
8 a number of cases commissioners have not accepted an admission as compelling evidence that the  
9 person was in the country illegally because the commissioner claimed that the person might not  
10 know if he was here illegally.

11  
12 In addition to serving the goals of Proposition 100, there is another compelling reason to  
13 accept Form IV evidence, and defendant admissions. If the State is not allowed to present evidence  
14 from the Form IV, and if the rules change simply because of the new constitutional provision  
15 applying to illegal immigrants, the State will be forced to bring the arresting officer to the Initial  
16 Appearance. To do so will jeopardize community safety by having numerous officers sitting at the  
17 jail waiting for hearings instead of being on patrol and protecting the community.

18  
19 Another issue that the rule needs to address, most likely in comments, deals with  
20 documentary evidence about a person’s status as an illegal immigrant. Defendants have claimed  
21 that even when a qualified government official testifies to a fact, the State still must provide  
22 documentary evidence to back this up. This standard is at odds with the holding of Simpson. This  
23 Court needs to make clear that hearsay evidence is permissible and may be relied on at a bail  
24 hearing.

25  
26 ///

27  
28 ///

**V. Other matters**

Yet another barrier that is completely new since the passage of Proposition 100 deals with identification of the defendant at the bail hearing. This has not been an issue in the past, as courts simply accepted the fact that the defendant was the defendant, barring some challenge to this by the defendant. The chain of custody from arrest was presumed and the facts rarely gave rise to a reason for a formal identification process with live testimony. Now, courts are sometimes demanding that the arresting officer make the identification at the bail hearing. Even an in-court identification by the arresting officer has been ruled insufficient for one commissioner. Barring a credible challenge by the defendant, the court should leave the issue of identification for later stages of the process such as the Preliminary Hearing or a Pre-Trial Identification Hearing supported by evidence: this new rule should specify appropriate limitations in the comments.

**VI. Victims' Rights**

The proposed rule is commendable in the way that it protects victims' rights. The timelines set out will allow time for victim notification, allow the parties to try and resolve the case through the successful Regional Court Center operations, and allow both sides time to prepare for a meaningful hearing. The current Simpson hearing process violates a victim's right to be notified prior to a hearing. Under A.R.S. §13-4409, the prosecutor's office is to be given five days to notify a victim of any criminal proceeding. By the timelines currently set under the administrative order, the court is saying it is not reasonable to allow the time for victim notification in every case involving Proposition 100. The change to the rules allowing up to seven days for a rehearing on bail status will address this notification concern, and victims will be allowed to participate in the process.

////

////



1 Copies of the forgoing mailed  
2 this 14 day of June, 2007 to:

3 Clerk of the Court  
4 Arizona Supreme Court

5 David K. Byers, Director  
6 Administrative Office of the Courts  
7 1501 West Washington  
8 Phoenix, AZ 85007  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 ARIZONA RULES OF CRIMINAL PROCEDURE

2  
3 Rule 7. Release

4 Rule 7.2. Right to release

5  
6 a. Before Conviction; Persons Charged With an Offense Bailable as a Matter of  
7 Right. Any person charged with an offense bailable as a matter of right shall be  
8 released pending or during trial on the person's own recognizance, unless the court  
9 determines, in its discretion, that such a release will not reasonably assure the  
10 person's appearance as required. If such a determination is made, the court may

11 b. Before Conviction; Persons Charged With an Offense Not Bailable as a Matter of  
12 Right. A person shall not be released on bail if the court finds the person is not  
13 bailable pursuant to A.R.S. § 13-3961. ~~If the allegation involves A.R.S. § 13-3961~~  
14 ~~(A) (5), the person shall not be considered bailable if the court finds that the proof is~~  
15 ~~evident or the presumption great that the person committed a serious offense and that~~  
16 ~~the proof is evident or the presumption great that the person entered or remained in~~  
17 ~~the United States illegally.~~ IF THE ALLEGATION INVOLVES A.R.S. § 13-3961  
18 (A) (5), THE PERSON SHALL NOT BE CONSIDERED BAILABLE IF THERE IS  
19 PROBABLE CAUSE THAT THE PERSON HAS ENTERED OR REMAINED IN  
20 THE UNITED STATES ILLEGALLY AND THE COURT FINDS PROOF IS  
21 EVIDENT OR THE PRESUMPTION GREAT THAT THE PERSON COMMITTED  
22 A SERIOUS OFFENSE. IN CASES INVOLVING A.R.S. § 13-3961(A)(5) THE  
23 COURT SHALL CONSIDER FORM IV EVIDENCE, ADMISSIONS OF  
24 DEFENDANTS AND ALL OTHER EVIDENCE USING THE SAME EVIDENCE  
25 AND PROCEDURAL STANDARDS APPLICABLE TO A.R.S. § 13-3961(A)(1-4).

26 b c. After Conviction

27 (1) Superior Court. After a person has been convicted of any offense for which the  
28 person will in all reasonable probability suffer a sentence of imprisonment, the person  
shall not be released on bail or on ~~his or her~~ the person's own recognizance unless it  
is established that there are reasonable grounds to believe that the conviction may be  
set aside on a motion for new trial, reversed on appeal, or vacated in any post-  
conviction proceeding. The release of a person pending appeal shall be revoked if the  
person fails to prosecute the appeal diligently.

1 (2) Limited Jurisdiction Courts.

2 (A) Conditions of Release Upon Appeal. After a defendant has been convicted of any  
3 offense for which a sentence of incarceration has been imposed, upon filing of a  
4 timely notice of appeal, the defendant shall remain, pending appeal, under the same  
5 release conditions imposed at or subsequent to the time of the defendant's initial  
6 appearance or arraignment, except as provided in this subsection ~~(b)~~ (c) (2). The  
7 release of the defendant pending appeal shall be revoked if the defendant fails to  
8 prosecute the appeal diligently. A defendant held in custody pending appeal shall be  
released in the event the defendant's sentence is completed before the appeal has been  
decided.

9 (B) Motion to Amend Conditions of Release. Upon the filing of a timely notice of  
10 appeal, the state, or the court on its own motion, may move to amend the conditions  
11 of release when it appears there is a substantial risk that:

12 (i) the defendant presents a danger to any person or the community; or

13 (ii) the defendant is unlikely to return to court if subsequently ordered to appear on  
14 the particular matter.

15 (C) Hearing. The court shall set a hearing on such an application within three days of  
16 the filing of the motion. Such hearing may be continued for good cause shown. The  
17 defendant may be detained pending the hearing. At the hearing, which shall be on the  
18 record, the defendant is entitled to representation by counsel. Any testimony of the  
19 defendant shall not be admissible in other proceedings except as it may relate to  
compliance with prior conditions of release, perjury, or impeachment.

20 (D) Findings. Based on findings stated on the record, the court may amend the  
21 conditions of release in accordance with Rule 7.3. In determining the method of  
22 release or the amount of bail, the judicial officer shall, on the basis of available  
23 information, consider the nature and circumstances of the offense, family or local  
24 ties, employment, financial resources, character and mental condition, the length of  
25 residence in the community, the record of arrests, convictions, and appearances at  
26 court proceedings, views of the victim, weight of the evidence, results of any drug  
tests, whether the accused has entered or remained in the United States illegally,  
whether the accused's residence is in this state, in another state or outside the United  
States, and any other factor provided by law.

27 (E) Superior Court Review. If the trial court enters an order setting a bond or  
28 requiring incarceration while the appeal is taken, the defendant may petition the

1 superior court, at any time after such order is entered, to stay the execution of  
2 sentence and to allow the defendant to be released without bond or to require a lower  
3 bond.

4 e d. Burden of Proof. Issues under Rules 7.2 (a) and ~~(b)~~ (c) shall be determined by the  
5 preponderance of the evidence. Issues under Rule 7.2 (b) shall be determined by the  
6 burden of proof set forth in that paragraph. The prosecutor shall bear the burden of  
7 establishing factual issues under Rule 7.2 (a), (b) and ~~(b)~~ (c) (2), ~~†~~The defendant shall  
8 bear the burden of establishing factual issues under Rule 7.2 ~~(b)~~ (c) (1).  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28